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DEPARTMENT OF JUSTICE, FEDERAL TRADE COMMISSION ISSUE JOINT COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES

Commentary Provides Greater Transparency and Understanding of Agencies' Use of the Guidelines

WASHINGTON, D.C. – The Department of Justice and the Federal Trade Commission (FTC) today jointly released a “Commentary on the Horizontal Merger Guidelines” that continues the agencies’ ongoing efforts to increase the transparency of their decision-making processes – in this case, with regard to antitrust review of “horizontal” mergers between competing firms.

The analytical framework and standards used to scrutinize the likely competitive effects of such mergers are embodied in the Horizontal Merger Guidelines, which the agencies jointly issued in 1992, and revised, in part, in 1997. The commentary, which is available now on both agencies’ Web sites, explains how the Justice Department and the FTC have applied particular guidelines principles, in the context of actual merger investigations.

“The commentary provides a new level of transparency in our merger enforcement decisions,” said Thomas O. Barnett, Assistant Attorney General in charge of the Department’s Antitrust Division. “The business community can see how the agencies have applied the Horizontal Merger Guidelines to a wide range of specific factual circumstances.”

The agencies have found that the business community and antitrust law practitioners generally consider the guidelines’ framework to be effective in yielding the right results in

individual merger investigations, and in providing clear guidance from which they can assess the antitrust risks of mergers they may be considering. The Justice Department and FTC have further observed, however, that business leaders and their counsel would substantially benefit from a more elaborate and detailed articulation of how the agencies and their staff actually incorporate the guidelines' framework when analyzing a merger's likely effect on competition and consumers. The commentary is the agencies' response to this important public interest.

"The merger review process is highly fact-intensive," said Deborah Platt Majoras, Chairman of the FTC. "By explaining how we have applied the guidelines to actual investigations, the commentary should foster greater public understanding about the review process, and in doing so, help businesses assess the potential antitrust risks they face when evaluating whether to proceed with a transaction."

The commentary contains an introductory chapter that describes the fundamental legal principles that govern the agencies' law enforcement approach to merger analysis, noting that "[t]he core concern of the antitrust laws, including as they pertain to mergers between rivals, is the creation or enhancement of market power." It follows with an overview of the guidelines' central focus – the likely competitive effects of mergers – and the intensively fact-driven nature of merger investigations, as well as the use of evidence in addressing multiple analytical elements within the guidelines framework.

In separate chapters, the commentary addresses key guidelines' elements including market definition and concentration; the potential adverse competitive effects of mergers, including coordinated interaction and unilateral effects; entry conditions; and efficiencies. Throughout the commentary there are short summaries of actual investigations into proposed mergers that one of the agencies conducted. These cases are included illustratively to enhance

understanding of particular points under discussion in the narrative.

A major theme that the commentary highlights is the “integrated approach to merger review” that the agencies apply in each case. The agencies do not apply the guidelines as a linear, step-by-step progression that invariably follows the exact order in which the various analytical elements appear in the guidelines, *i.e.*, an order that necessarily starts with market definition and necessarily ends with efficiencies or failing assets.

For example, the agencies do not settle on a market definition before proceeding to address other issues. Rather, the process of defining the market is directly linked to a competitive effects analysis. As part of the integrated analysis, market definition can help inform competitive effects and competitive effects can help inform market definition. The commentary points out numerous examples of this integrated approach to guidelines analysis, in which the agencies’ central focus remains on the likely competitive effects that will result from the merger under review.

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